Supreme Court, U.S.
FILED
OCT 18 2004
OFFICE OF THE CLERK

No. 04-242

In the
Supreme Court of the United States

ESTHER P. EMMERMAN and
RONALD Z. EMMERMAN,

Petitioners,

v.

THE CITY OF HIGHLAND PARK, et al.,

Respondents.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, Second District

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a property aggregation ordinance alone defeat a claim that a city has stripped a separately platted and independently developable plot of land of all economically beneficial use to create public open space, thus causing an unconstitutional taking of property, by requiring that the economically idled plot be treated as an appendage of a valuable, contiguous area of land?

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners Esther P. Emmerman and Ronald Z. Emmerman (Emmermans) respectfully file this reply to Respondent City of Highland Park's Opposition to the Petition for Writ of Certiorari (Opp.).

INTRODUCTION

Respondents' opposition fails to appreciate the nationally important issue of federal takings law raised by the decision below and the federal conflicts that require this Court's intervention.

ARGUMENT

I

THIS CASE RAISES AN IMPORTANT ISSUE OF TAKINGS LAW ON WHICH FEDERAL COURTS CONFLICT, THE RESOLUTION OF WHICH IS NECESSARY BEFORE COURTS CAN APPLY *PENN CENTRAL*'S AD HOC FACTUAL INQUIRY OR ANY OTHER TAKINGS STANDARD

Respondents' opposition mistakenly argues that this case fails to raise an important federal issue or conflict in questioning the circumstances under which courts may aggregate an area of regulated land with a contiguous area prior to determining if the regulation has taken private property. Opp. at 11.

A. The Petition Raises a Significant Issue of Takings Law and This Case Is an Appropriate Vehicle for Resolution of That Issue

1. This Court Has Never Directly Addressed the Relevant Land Parcel Problem, Much Less Indicated That It Is To Be Solved by Tests Designed To Determine if a Regulatory Taking Occurred

Respondents' opposition suggests that the issue of how to determine the relevant land parcel for takings analysis has already been settled, *sub silencio,* by this Court's articulation of a three-part ad hoc takings test in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978) (regulatory takings analysis guided by inquiry into the economic impact of regulation, the extent to which the regulation has frustrated investment-backed expectations and the "character of the governmental action"). *See* Opp. at 11-14. This position conflates the inquiry into whether there is liability for a regulatory taking with the inquiry into the nature of the property subject to liability analysis.

The inquiry into the property interest subject to takings scrutiny is distinct from, and precedes, the issue of whether there is liability for a taking. *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 497 (1987). Indeed, a court cannot even begin to inquire into whether there is liability for a taking until it resolves the question of the property interest at issue. *Id.* at 498 (determining relevant parcel of coal interests before applying *Penn Central* takings test). The factually-based takings test articulated in *Penn Central* was not designed to resolve, and was not used by the *Penn Central* Court to resolve, the critical initial issue of the relevant property interest. The case-specific *Penn Central* takings test simply addressed "[t]he question of what constitutes a 'taking' for

purposes of the Fifth Amendment." *Penn Central*, 438 U.S. at 123. Thus, *Penn Central*'s ad hoc takings test depends on and follows, rather than governs, the separate inquiry into the nature of the relevant property interest. *See District Intown Properties Limited Partnership v. District of Columbia*, 198 F.3d 874, 879 (D.C. Cir. 1999) ("Under both *Lucas* and *Penn Central*, then, we must first define what constitutes the relevant parcel before we can evaluate the regulation's effect on that parcel.").

While recognizing the extent to which issues of takings liability hinge on the issue of the relevant property, this Court has acknowledged that it has not provided meaningful guidance on the relevant property issue. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992); *see also Keystone*, 480 U.S. at 497. The lack of guidance is especially pronounced in cases where an area of regulated land lies contiguous to another area in common ownership; i.e., where, the horizontal boundaries of the relevant takings parcel are unclear. *Lucas*, 505 U.S. at 1016 n.7.

The parties agree that the ultimate goal in addressing the unresolved relevant land parcel issue is to define the "parcel as a whole." But, significantly, even Respondents recognize that "reference to the 'parcel as a whole' and the 'property in its entirety' *does not . . . resolve the specific factual question of what constitutes the whole parcel.*" Opp. at 13 (emphasis added). While this Court has repeatedly indicated a desire to clarify the specific "whole" parcel issue in the context of contiguous land, *see Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) (noting Court's "discomfort" with the undefined "whole parcel" principle in horizontal land context), it has not yet done so.

The Emmermans do not contend that the Court should take this case to establish some "per-se" rule that "will either *always* result in commonly owned properties being aggregated . . . or *always* result in commonly owned properties not being

aggregated." Opp. at 10. The Emmermans agree that such a per se rule is not desirable. The Emmermans do, however, respectfully suggest that some guidance beyond the indeterminate "parcel as a whole" principle is necessary and overdue in the context of contiguous land. Petitioners' Appendix (Pet. App.) at 10-14. They specifically contend that a legal lot of record that is separately platted and independently developable must be presumed to be a constitutionally distinct area of property for takings analysis and that it takes more than an ordinance to defeat this presumption.

2. This Case Will Not Invalidate Laws Requiring Contiguous Nonconforming Lots To Be Treated as a Single Lot for Zoning Purposes

Respondents argue that this case threatens the validity of ordinances requiring legal lots of record to be treated as one unit for zoning purposes. Opp. at 27. This fear betrays a misconception about the nature of the issue at hand.

The issue presented is whether an ordinance requiring a vacant legal lot of record to be aggregated with a contiguous lot for zoning purposes can by itself compel aggregation of the lots for purposes of regulatory takings analysis. The Emmermans position is that government cannot combine a regulated, independently developable legal lot of record with contiguous land, and so defeat a takings claim, simply by passing an ordinance. To the extent that the ordinance in this case is typical, and the Emmermans agree that is not uncommon for local governments to enact similar measures, the same principles would apply. That is, when the owner of a contiguous legal lot of record subject to a property aggregation ordinance receives a final decision denying all or substantially all development of the lot, thus ripening a taking claim, the ordinance cannot by itself aggregate the owner's lots for takings analysis.

The Emmermans' challenge would impose limits on the government's ability to avoid the duty to compensate for taking property merely by passing laws that define away property rights. *Cf. Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (The "State, by ipse dixit, may not transform private property into public property without compensation."). But it would hardly invalidate common non-conforming, contiguous lot aggregation ordinances. Local governments would remain free to enact such ordinances for local *zoning* purposes. They would, however, not be able to rely on the ordinances alone to aggregate independently developable contiguous legal lots of record for *constitutional* purposes.

Nor, as previously discussed, is there any danger that this case will categorically preclude aggregation of contiguous lots for takings purposes. It would simply require the government to rely on grounds beyond an aggregation ordinance to defeat the presumption that legally subdivided and independently developable lots of record are also distinct units for takings analysis. Ultimately, it will provide much needed guidance on the critical unresolved issue of how courts are to identify the relevant takings parcel when faced with contiguous areas of land.

B. Federal Courts Are in Conflict in Principle and Result on the Issue of Whether Independently Developable and Separately Divided Land Can Be Aggregated for Takings Analysis

Respondents argue that there are no federal conflicts on the issue of the aggregating contiguous land for takings analysis because, although courts have arrived at divergent outcomes, they have consistently engaged in a rule-deficient fact-based inquiry in so doing. Opp. at 19. Such a pattern supports Petitioners' contention that lower courts are in need of further

guidance on the criteria for determining whether to aggregate contiguous land. In any event, Respondents' argument proves too much. Under the logic of that argument, reviewable federal conflicts will rarely, if ever, occur because even patently contradictory judicial decisions can be reconciled on the ground that they were fact specific.

The test for conflict is whether courts apply different principles in considering the legal import of similar facts and arrive at different outcomes in relatively similar factual settings. On the relevant land parcel issue, particularly on the issue of whether legally and developmentally independent land should be aggregated, federal courts are in conflict in principle and in result.

As one example, the Federal Circuit Court of Appeals and Court of Appeals for the District of Columbia have applied different principles to arrive at different results in considering whether a severely restricted area of legally and developmentally independent land should be aggregated with a contiguous area of land for purposes of takings analysis. Compare *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994), and *Palm Beach Isles Associates v. United States*, 208 F.3d 1374, 1381 (Fed. Cir. 2000), with *District Intown Properties Limited Partnership*, 198 F.3d at 880. In *Palm Beach Isles*, the Federal Circuit excluded from the relevant parcel 261 acres of land that had been sold and developed before application of regulations restricting the owner's remaining 50 or so contiguous acres; only the 50 acres were considered for the regulatory takings analysis. 208 F.3d at 1381. In so doing, the Federal Circuit focused on the legal and developmental independence of the two areas of land. *Id.* (stressing that development of the 261 acres was "temporally remote" from the owner's attempt to develop the remaining, restricted 50 acres of land, and that the two areas of land were "legally unconnected").

In *District Intown* on the other hand, the D.C. Circuit concluded that a parcel of land that had been developed as an apartment building *should* be aggregated with a restricted and separately divided area of contiguous land for takings analysis. 198 F.3d at 880. Unlike the Federal Circuit, the D.C. Circuit did not focus on the degree of legal connection between the parcels or the fact that the development of one of the parcels was "temporally remote" from the landowner's attempt to use the restricted contiguous area. *Id.*

The fact that both the Federal Circuit and D.C. Circuit purport to apply a fact-specific inquiry to resolve the relevant parcel issue does not diminish their inconsistency on whether and on what basis legally and developmentally independent areas of contiguous land should be aggregated for takings analysis. This Court should grant the Petition to give the lower courts guidance on the circumstances and principles under which legally distinct areas of land can be aggregated for takings analysis.

II

THE LOWER COURT'S DETERMINATION THAT AN ORDINANCE AGGREGATED THE EMMERMANS' TWO LEGAL LOTS OF RECORD FOR TAKINGS ANALYSIS DOES NOT COMPORT WITH FAIRNESS AND JUSTICE

Respondents' opposition argues that the Emmermans have not suffered any injustice by the lower court's decision aggregating their two legal lots of record for takings analysis. Opp. at 4. In so doing, Respondents mischaracterize some of the pertinent facts in this case.

The Emmermans acquired two separately platted lots in an established residential subdivision in 1968 for the amount of $45,000. Pet. App. at A-3. But, contrary to Respondents'

contentions, the Emmermans apportioned this sum between the two lots, considering $25,000 as the price for one lot and $20,000 for the other.[1] Pet. App. at A-7-A-8. Although both lots were considered nonconforming because they were smaller than allowable under the building code, the City had already permitted a home on one lot. Pet. App. at A-3.

Between the time the lots were acquired and 2001, many other property owners in the subdivision were permitted to build homes on lots that are the same size or smaller than the Emmermans' vacant lot. Respondents argue that, in making this assertion, the Emmermans are ignoring zoning lines. In this way, Respondents imply that only undersized lots in a different zoning district from the Emmermans' have been developed. This is not the case: the City has allowed residential development of lots the same size or smaller than the Emmermans' *both within the same zoning district as the Emmermans'*, and across the street in a different zoning district. *See* Pet. App. at A-30 (lower court recognizing that it had to accept as true the Emmermans' allegations that the City permitted "others to build on undersized lots in the same neighborhood or [zoning] district").

The Emmermans have never built anything on their vacant lot, physically used it in any way as a "backyard" or appendage of their developed lot, or had their lots formally merged into a single lot of record. Their vacant lot is a distinct, legal residential lot of record. It is the only undeveloped nonconforming lot out of the many nonconforming lots in their zoning district and in the residential subdivision. Pet. App. at A-37 (O'Malley, J., dissenting).

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[1] The lower court recognized that "[t]he claim that Ronald [Emmerman] apportioned $20,000 of the purchase price for the vacant lot and that his testimony was uncontroverted is an issue of credibility and weight, which we may not review." Pet. App. at A-8.

The City denied the Emmermans' application to build a home on the vacant lot because the lot provided open space and, so, served a public purpose. Pet. App. at A-3. When the Emmermans sought just compensation, the Illinois courts agreed with the City that the Emmermans' separately platted and independently developable vacant lot had to be combined with their valuable contiguous lot for takings analysis because an ordinance required the lots to be "used" and "managed" as "one zoning lot."[2] Pet. App. at A-19.

The situation would be entirely different if the Emmermans' vacant lot was an "individual, isolated non-conforming lot that fails to meet the minimum lot size requirement," instead of contiguous to a second non-conforming lot. First, the City code allows such an isolated lot to be developed. Opp. at 5. Second, such a lot would be presumed to be the relevant parcel in a takings challenge, giving rise to a strong claim to just compensation if it were economically idled. *See, e.g.*, *Harrington Glen, Inc. v. Leonia Board of Adjustment*, 243 A.2d 233 (1968) (denial of variance to build on an undersized lot amount to a taking), *Town of Beverly Shores v. Bagnall*, 570 N.E.2d 1363 (Ind. Ct. App. 1991) (denial of variance to build a home on undersized lot caused a taking). But, because the Emmermans own an adjoining lot, the City's contiguous lot aggregation ordinance denies them the ability to build a home on their vacant lot and, under the lower court's rationale, requires their separately

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[2] In combining the Emmermans' lots into a "unitary parcel," the lower court stressed that the Emmermans had purchased their lots "as a single unit at one time," held the lots "in contiguous ownership since [they] bought them." Pet. App. at A-19. All of these actions were mandated by the City's property aggregation ordinance, which required contiguous nonconforming lots to be "maintained," "used," and therefore, transferred, as one zoning lot. Pet. at 4, 5; Pet. App. at 19.

platted, legal lots of record to be combined into a "unitary [takings] parcel" that defeats their takings claim.

This outcome cannot be reconciled with basic principles of fairness. At the least, those principles require that owners of functionally and physically identical properties have similar rights under the Constitution. *Cf. Palazzolo v. Rhode Island*, 533 U.S at 634 (O'Connor, J., concurring) (explaining that "the nature and extent" development permitted to others "vis-a-vis the development sought by the claimant" helps determine rights to compensation); *Palazzolo*, 533 U.S. at 630 ("A regulation or common-law rule cannot be a background principle for some owners but not for others."). In this case, fairness requires that the owners of contiguous, separately platted, and independently developable lots share the presumption, enjoyed by owners of isolated lots, that such lots are single units for takings analysis. And the government cannot defeat these principles of equity simply by passing a law. *Cf. Palazzolo*, 533 U.S. at 626.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: October, 2004.

Respectfully submitted,

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